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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-763

RAMIRO ALVARADO AND VALENTINE KALIE,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

RAMIRO ALVARADO AND VALENTINE KALIE,
Petitioners,

versus

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RAMIRO ALVARADO and VALENTINE KALIE, petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause September 24, 1975. Petition for Rehearing denied October 28, 1975.

REFERENCE TO OPINION BELOW

The opinion and order of the United States Court of Appeals for the Fifth Circuit are not yet reported; a copy of each is appended hereto in Appendix, infra, pp. 1a and 6a.

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JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was delivered on the 24th day of September, 1975; timely filed motion for rehearing was denied October 28, 1975.

Jurisdiction to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether the Trial Court erred in taking judicial notice for the purpose of Appellants' Motion to Suppress of its findings in another and separate case thus denying Appellants their Sixth Amendment rights to confrontation and cross-examination of witnesses.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusa-

tion; to be confronted with a witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

2. 18 U.S.C. 43. Presence of the Defendant.

"The Defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions where offense is not punishable by death, the Defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions where offense is punishable by fine or by imprisonment for not more than one year or both, the Court, with the written consent of the Defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."

STATEMENT OF THE CASE

This is an appeal from the conviction of Ramiro Alvarado for conspiracy to possess with intent to distribute a quantity of marijuana in violation of Title 21, United States Code, Section 846.

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On September 7, 1973, an indictment was returned against Appellant for conspiracy to possess marijuana with intent to distribute and for possession of marijuana with intent to distribute. Valentine Kalie was named as a co-indictee in both counts and Maria Salinas and Frone Fai Miracle were named as unindicted co-conspirators. (R 449-451). On December 13, 1974, the Government moved for and the Trial Court ordered dismissal of the possession count against both Appellant and Kalie (R 485).

On January 20, 1975, trial of the case before a jury began. (R 133). On January 21, 1975, the jury found both Appellant and Kalie guilty. (R 488). On February 21, 1975, the Trial Court sentenced Appellant to four years imprisonment. (R 531). On the same day Appellant filed his Notice of Appeal (R 526), and on February 25, 1975, Appellant filed an Amended Notice of Appeal (R 529).

On November 20, 1973, Appellant filed his Motion to Suppress the marijuana seized in this case from a car occupied by the unindicted co-conspirators in violation of the Fourth Amendment to the United States Constitution. (R 460-461). On December 3, 1973, the Government filed an answer to Appellant's Motion to Suppress stating that Appellant lacked standing and that the search was a valid border search, anyway. (R 471-473).

Prior to the trial of this case the Government in writing requested that the Trial Court take judicial notice of its findings in Jose Ascencion Garcia, Criminal Action No. 74-C-62 and gave notice to

Appellant that it was the Government's intention not to produce witnesses to support the search at the checkpoint. (R 476). Appellant objected to this procedure in writing prior to the pre-trial hearing. (R 479).

On November 18, 1974, a pre-trial hearing was held. (R 155). At the hearing the Trial Court stated its intention to carry Appellant's and Kalie's Motions to Suppress along with the trial of the case and rule on them at the conclusion of the Government's case. (R 44-45, 47, 49-50, 53). The Trial Court also ruled that it would take judicial notice of its findings in the Garcia case as requested by the Government. (R 38). An objection was again made to this procedure by Appellant's attorney and a request was made that the record be allowed to reflect that neither the Appellant nor his attorney were present at the time the facts were developed which resulted in the findings made by the Trial Court. (R 38, 40, 41). At page 116 of the Record again complaint was made of this procedure.

At the conclusion of the Government's case, the Trial Court overruled Appellant's and Kalie's Motions to Suppress. (R 322). On January 28, 1975, the Trial Court filed a written order finding that neither Appellant nor Kalie had standing to object and that the search was a valid border search, anyway. (R 516-521).

During the trial the following testimony was elicited. Richard Powell, a Border Patrol agent, stated that on May 5, 1973, while working at a checkpoint five miles south of Sarita, TX, he stopped a vehicle oc-

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cupied by Maria Salinas and Frone Fai Miracle, questioned them, searched the vehicle, and seized a quantity of marijuana from the vehicle's trunk. (R 130-145).

While questioning the girls two things caught the agent's attention. First, the strong odor of strawberry scent. Second, Frone Fai Miracle "sorta just displayed her feminine charms a little bit overabundantly." The agent concluded on the basis of his two years experience that the girls were trying to disguise the smell of marijuana and divert his attention. At that point he "more or less figured something was up" and decided to search the vehicle and asked the girls to pull over to the side of the road. (R 130-135).

Agent Powell stated that the girls said they didn't have a key to the trunk which added to his suspicions. Agent Powell called into Kingsville, TX, to get some special tools to take the back seat out to gain access to the trunk. In the meantime, he notified the Drug Enforcement Agency about the arrest and advised them that he would let them know what was found. (R 135-137). As an afterthought, Agent Powell said he was looking for aliens as well as contraband. (R 143).

Maria Salinas testified that she first met Appellant two or three days before she was arrested at a Shakey's pizza parlor in McAllen and that he offered her $400 to drive a car with marijuana in it which she agreed to do. (R 192-194).

Late in the morning of May 5, 1973, Appellant came by Salinas' apartment and gave her keys to a car. He

told her the car was parked outside in the apartment parking lot and that he would call her later. Kalie was standing outside by the car during this conversation. Later in the day Appellant called Salinas and told her to drive the car to Riviera as soon as she was ready. Appellant told her to drive the car up to a restaurant in Riviera and leave the car there. (R 204-207). Later in the day Salinas and Miracle were stopped and searched in the car before they could reach their destination. (R 192-194, 204-207).

Frone Fai Miracle testified along the lines of Maria Salinas' testimony later in the trial. (R 255-269). Valentine Kalie testified prior to the trial that he was the owner of the car seized. (R 118). John Donald, a DEA agent, testified Kalie had come to his office on May 7, 1973, and told him the car had been stolen while he was on a shopping trip in Edinburg; that he had left his keys in the car, that when he returned and discovered his car was stolen he put his purchases down on the street and went to call the police and that when he returned his purchases had also been stolen. (R 122-126, 145-153).

REASONS FOR ALLOWANCE OF WRIT

1.

The constitutional questions presented in this cause arise under the Sixth Amendment. Appellant contends for and the opinion of the Circuit Court rejects the proposition that the Trial Court erred in taking judicial notice for the purposes of Appellant's motions to suppress of its findings made in another and separate case; and thus denied Appellants the

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right to confront and cross-examine witnesses. See *United States v. Clark*, 475 F. 2d 240 (1973) and *Painter v. Texas*, 380 U.S. 400, 85 Sup. Ct. 1065, 13 L. Ed. 2d 923. The precise issue is yet to be decided by the Supreme Court.

2.

It is well settled that "in all criminal prosecutions, the accused shall enjoy the right — to be confronted with the witnesses against him" and it is so fundamental as to be applicable to the States by the Fourteenth Amendment. *Painter v. Texas*, 380 U.S. 400, 406-407, 85 Sup. Ct. 1065, 13 L. Ed. 2d 923 (1965). The defendant's presence unless waived by him *United States v. Tortora*, 464 F. 2d 1202, 1208-1210 (2d Cir. 1972), is required when a jury is empanelled, see *Hopt v. Utah*, 110 U.S. 574, 4 Sup. Ct. 202, 28 L. Ed. 2d 262 (1884) and *United States v. Crutcher*, 405 F. 2d 239, 242-244 (2d Cir., 1968), and when the trial judge gives additional instructions to the jury, *Evans v. United States*, 284 F. 2d 393, 394 (6th Cir., 1960). The Second Circuit speaking through Justice Mansfield in *United States v. Clark*, 475 F. 2d 240 (1973), states "no less should be required at a pretrial suppression hearing held to determine the constitutionality of a seizure of evidence from an accused, where witnesses are to be questioned." p. 246.

The *Clark* case was one very similar to this cause where a portion of the suppression hearing was held in camera outside the presence of the defendant and without objection from the defendant's attorney. It is important to note that the *Clark* case was reversed even though there was no objection from the defense attorney to the procedures used and even though the

defendant's attorney was present for the purpose of cross-examination and even though the Court in that case recognized that there might be involved a "compelling urgency of protecting the confidentiality of the profile which has been devised as a method to reduce the threat of hijacking." p. 224.

In the instant case, the only reason for the Trial Court's action in depriving the defendant of the constitutionally protected right to confront the witnesses was expediency. Apparently, it would take too much time and be too much trouble to the Government to have allowed Appellant his constitutionally secured right of confrontation and cross-examination.

In the *Garcia* case, of which judicial notice was taken, witnesses were called and other defense attorneys, including Garcia's, were allowed to cross-examine and other defendants were present. However, neither Appellant nor his attorney were participants in that proceeding.

The Court in *Clark* concluded its discussion of this question by stating "under the circumstances, the exclusion of the defendant and of the public from that portion of the suppression hearing which did not deal directly with the characteristics of the secret anti-hijacking profile constituted plain error. Rule 52(b), F.R.Cr.P." p. 248.

Appellant relies on *Clark* and the language therein and submits that this cause should be reversed and remanded.

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3.

The instant case is an appropriate vehicle for settling important questions of Federal Law implicating the Sixth Amendment. If the record presents for determination the meaning of Rule 43 of the Federal Rules of Criminal Procedure and more specifically and more important the Sixth Amendment to the Constitution of the United States of America.

CONCLUSION

For the reasons set forth above, Petition for a Writ of Certiorari should be granted and on further hearing on the merits the opinion and judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and remanded for further proceedings.

Respectfully submitted,

_____

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ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I, Daniel V. Alfaro, do hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on counsel for Respondent by depositing same in the United States mail, postage prepaid, addressed to the Honorable Edward McDonough, United States Attorney, P. O. Box 61129, Houston, TX 77208, and upon Honorable Robert H. Bork, Solicitor General, Department of Justice, Washington, DC 20530, this ____ day of November, 1975.

_____

Daniel V. Alfaro

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Ramiro ALVARADO and Valentine Kalie, Defendants-Appellants.

No. 75-1583
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Sept. 24, 1975.

Appeals from the United States District Court for the Southern District of Texas.

Before WISDOM, BELL AND CLARK, Circuit Judges.

PER CURIAM:

Defendants Ramiro Alvarado and Valentine Kalie seek reversal of their convictions for conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846. They attack the constitutionality of the border search leading to discovery of the prohibited substance and the correctness of two district court actions: (1) in taking judicial notice of facts found in a prior decision, and (2) in refusing to admit

*Rule 18, 5 Cir., See *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

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certain impeachment evidence. We have reviewed each of these contentions and find them to be without merit. Accordingly, we affirm.

Briefly recounted, the testimony at trial revealed that on May 5, 1973, a vehicle occupied by two unindicted coconspirators, Maria Isabel Salinas and Frone Fae Miracle, was stopped by United States Border Patrol agent Richard J. Powell pursuant to citizenship check at the Sarita, Texas, permanent checkpoint. While routinely inquiring into the citizenship of the two ladies, agent Powell was alerted by the strong scent of strawberry emanating from the car. Powell knew from experience that strong smelling sprays of various scents were often utilized to disguise or cover the smell of marijuana. Simultaneously, the agent noticed that Ms. Miracle was displaying "her feminine charms a little bit overabundantly". Again, experience warned agent Powell that suggestive overtures by females were often used to distract an agent's attention. These indicia of suspect conduct caused him to request that the trunk be opened. The driver responded that she did not have a key. Agent Powell knew this to be still another method often used to secret illicit activity by persons who hoped that the agent would allow their vehicle to pass rather than to take the time and effort necessary to forcibly open the trunk. Aroused by this sequence of seemingly evasive maneuvers, Powell directed the automobile to a secondary inspection point for further inspection. His diligence was rewarded by discovery of some 290 pounds of marijuana hidden in the trunk of the vehicle.

At trial below, the two women testified that appellants had induced them to drive a car containing marijuana from McAllen, Texas, to Reviera, Texas, for 400 dollars. According to these witnesses, Alvarado issued the instructions and Kalie supplied the automobile.

On appeal both defendants argue that the search of the vehicle was unconstitutional. We disagree. In deciding the issue we are governed by pre-*Almeida-Sanchez*[1] precedent since this search occurred prior to the Supreme Court's pronouncement in that cause.[2] Under this precedent, the border "nexus" of the Sarita checkpoint is beyond dispute. *E.g., United States v. Wooldridge*, 508 F.2d 802 (5th Cir. 1975); *United States v. Merla*, 493 F.2d 910 (5th Cir. 1974). We need only determine whether agent Powell had "reasonable cause to suspect" a customs or immigration violation. *United States v. McDaniel*, 463 F.2d 129, 132 (5th Cir. 1972), *cert. denied*, 413 U.S. 919, 93 S.Ct. 3046, 37 L.Ed.2d 1041 (1973); *Accord, United States v. Diemler*, 498 F.2d 1070, 1072 (5th Cir. 1974). Clearly he had such reasonable cause here. The cumulative impact of the strong scent of strawberry, the apparent lewdness of Ms. Miracle's demeanor and the unavailability of a trunk key, clearly formed a reasonable basis for the suspicion that the trunk contained contraband.[3]

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1 *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973).

2 The Supreme Court has ruled that *Almeida-Sanchez* be given prospective application only. *United States v. Peltier*, ___ U.S. ___, 95 S.Ct. 2313, 45 L.Ed.2d 374, 43 L.W. 4918 (June 24, 1975); *Bowen v. United States*, ___ U.S. ___, 95 S.Ct. 2569, 45 L.Ed.2d 641, 43 L.W. 5024 (June 24, 1975).

3 Having decided the constitutional issue against defendants, we need not reach the underlying issue of their standing to object.

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Defendants next point contests the trial court's right to take judicial notice of the location, justification, and other physical aspects of the Sarita checkpoint as developed and analyzed by it in a prior criminal proceeding, *U.S.A. v. Jose Ascension-Garcia*, Criminal No. 72-C-82. Again, we find no error. Clearly the trial judge was warranted in taking judicial notice of immutable geographic and physical facts adjudicated in a previous proceeding. *See* Rule 201, Federal Rules of Evidence. Additionally, we see that these same facts have been noted previously by this court in *United States v. Merla, supra*. This facility of accepting what was plainly true could not abridge any Sixth Amendment right to confront witnesses.

Finally, Alvarado asserts as error the trial court's refusal to permit impeachment of Salinas and Miracle through cross-examination into the fact that both were prostitutes and had a homosexual relationship. Having failed to offer proof of conviction of either for prostitution, it was not error to refuse cross-examination on that issue. "[I]t is firmly established in this circuit that a witness may not be impeached by inquiry into specific acts of misconduct not resulting in a conviction." *Truman v. Wainwright*, 514 F.2d 150, 152 (5th Cir. 1975). Similarly, except upon proof that the witnesses had either been convicted of the crime of sodomy, or had admitted to such unnatural acts that would constitute the crime of sodomy, cross-examination on the subject of whether they had a homosexual relationship would be improper. *See Smith v. State*, 490 S.W.2d 902, 907, ref. n. r. e. (Tex. Civ.App. 1972). While *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347, 1970 teaches the error of

refusing reasonable cross-examination into the reasons behind a prosecution witness' willingness to cooperate, that case is distinguishable. In the first place, the proposed examination would have been improper impeachment as demonstrated above. In the second place, proof of prostitution activities would have established no special incentive for the witnesses to corroborate each others testimony. In the third place, defendants only proposed proof of a lesbian relationship was through the hope for admissions by the two women. The court correctly refused to permit this sort of speculative adventure.

Affirmed.

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APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1583

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

RAMIRO ALVARADO and VALENTINE KALIE,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING
(OCTOBER 28, 1975)

Before WIDSOM, BELL and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-763

RAMIRO ALVARADO AND VALENTINE KALIE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners' sole contention is that the trial court violated their Sixth Amendment rights by taking judicial notice of the geographic location and other physical aspects of a border checkpoint which had been established in a prior criminal proceeding.

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846. Petitioner Alvarado was sentenced to four years' imprisonment to be followed by a special parole term of two years. Petitioner Kalie was sentenced as a young adult offender with a special parole term of two years. The court of appeals affirmed (Pet. App. A).

The evidence showed that on May 5, 1973, while on duty at the Sarita checkpoint, Border Patrol Agent Richard Powell stopped an automobile occupied by

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unindicted co-conspirators Maria Salinas and Froni Miracle (Tr. 130-131, 146).[1] The checkpoint was five miles south of Sarita, Texas (Tr. 130), and 85 miles from the Mexican border on U.S. Highway 77, the most direct route north from the border. See *United States* v. *Merla*, 493 F.2d 910, 911 (C.A. 5); see also p. 3, *infra*.

While questioning the two women about their citizenship, several things aroused agent Powell's suspicion that they were transporting marijuana. First, he noticed the strong scent of strawberries and he knew from experience that strong sprays are often used to hide the scent of marijuana (Tr. 131-132). Additionally, one of the women was wearing a low-cut top and was "display[ing] her feminine charms" by leaning over, a not unusual method used to distract a Border Patrol officer's attention (Tr. 134-135). Finally, when he asked for a key to the trunk of the car, the women told Powell that they did not have a trunk key (Tr. 135).

Sensing "something was up," Powell directed the women to pull over to a secondary inspection point where, upon removing the back seat and searching the car's trunk, he discovered approximately 291 pounds of marijuana (Tr. 135-136, 173).[2]

At trial, Salinas and Miracle testified that petitioner Alvarado offered them $400 to drive a car which would be filled with marijuana 400 miles along the border (Tr.

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[1]"Tr." refers to the transcript of the trial, which was reprinted with its original pagination in brackets as a part of the appendix in the court of appeals.

[2]The search was conducted prior to this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266, which the Court has held shall be given prospective application only. *United States* v. *Peltier*, 422 U.S. 531. See Pet. App. 3a.

193-194; Pet. App. 3a). Petitioners later went to Salinas' apartment and gave her the keys to Kalie's car which contained the marijuana later discovered by agent Powell (Tr. 118, 195-196, 255-260).

At a pretrial hearing on various preliminary matters, the trial court informed counsel for petitioners (Tr. 38):

> I have, in the past, and I will in this case, take judicial notice of the findings that I made in the case of the [*United States* v. *Jose Ascencion Garcia*, Criminal Action No. 72-C-62], with regard to the location of the Checkpoint, and the judicial notice does not take into account anything that happened with regard to these particular Defendants as they approached the Checkpoint, as they were stopped and what occurred from that time on. The judicial notice will be with regard to the situation surrounding the establishment of the Checkpoint, its location, and things of that nature.

As the court of appeals held (Pet. App. 4a), the district court acted properly:

> Defendants next point contests the trial court's right to take judicial notice of the location, justification, and other physical aspects of the Sarita checkpoint as developed and analyzed by it in a prior criminal proceeding, *U.S.A.* v. *Jose Ascension-Garcia*, Criminal No. 72-C-82 [*sic*]. Again, we find no error. Clearly the trial judge was warranted in taking judicial notice of immutable geographic and physical facts adjudicated in a previous proceeding. *See* Rule 201, Federal Rules of Evidence. Additionally, we see that these same facts have been noted previously by this court in *United States* v. *Merla*, [493 F.2d 910 (C.A. 5)]. This facility of accepting

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what was plainly true could not abridge any Sixth Amendment right to confront witnesses.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.

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[3]Petitioners' reliance (Pet. 8) on *Pointer* v. *Texas*, 380 U.S. 400, and *United States* v. *Clark*, 475 F.2d 240 (C.A. 2), is misplaced. In *Pointer* this Court held that a defendant's Sixth Amendment right to be confronted with the witnesses against him applies to the states, thereby precluding the introduction at trial of a witness' statement at a preliminary hearing where the defendant was not represented by counsel and thus did not have the opportunity to cross-examine the witness effectively. In *Pointer*, the witness was the victim whose testimony had a direct bearing on the defendant's guilt.

In *Clark*, the defendant was entirely excluded from a suppression hearing relating to the drugs he was accused of possessing. Since this proceeding had a direct bearing on the defendant's guilt, the court held that his Sixth Amendment right of confrontation was violated.

Here, in contrast, judicial notice properly was taken of the geographic location and physical aspects of the Sarita checkpoint—matters of common knowledge not pertaining directly to petitioners' guilt or innocence.

DOJ-1976-02